Supreme Court, U.S.
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No.

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1996

OHIO ADULT PAROLE AUTHORITY, et al.
Petitioners,

v.

EUGENE WOODARD,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE
VALIDITY OF CLEMENCY PROCEDURES

QUESTIONS PRESENTED

I.

WHETHER STATE CLEMENCY PROCEDURES MAY BE REVIEWED UNDER THE DUE PROCESS LIMITATIONS ON A STATE'S OVERALL SCHEME OF ADJUDICATION OF CRIMES AND PUNISHMENT ESTABLISHED BY *EVITTS V. LUCEY*, 469 U.S. 387 (1985), OR WHETHER *CONNECTICUT BOARD OF PARDONS V. DUMSCHAT*, 452 U.S. 458 (1981) CONTAINS THE SOLE DUE PROCESS LIMITATIONS ON THOSE PROCEDURES.

II.

WHETHER INMATE INTERVIEWS, HELD VOLUNTARILY AT THE REQUEST OF THE INMATE AS PART OF A STATE CLEMENCY PROCEDURE, IMPOSE AN UNCONSTITUTIONAL CONDITION ON THE INMATE'S FIFTH AND FOURTEENTH AMENDMENT PRIVILEGE AGAINST SELF INCRIMINATION.

LIST OF PARTIES

Petitioners are the Ohio Adult Parole Authority; Jill Goldhart, Chief of the Adult Parole Authority; Margrette Ghee, Chairwoman of the Ohio Adult Parole Board; Walter Escols; Raymond E. Capots; William E. Hudson; Robert E. Smith; Richard Gooch; Gloria Andrews; Jay R. Denton; and Constance M. Upper.

Respondent is Eugene Woodard.

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OPINIONS AND JUDGMENTS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit, entered on March 3, 1997, is reported. *Woodard v. Ohio Adult Parole Authority*, 107 F.3d 1178 (6th Cir. 1997). (A-1). The order of the United States District Court for the Southern District of Ohio, Eastern Division, granting petitioners' motion for judgment on the pleadings on September 8, 1995, is unreported. *Eugene Woodard v. Ohio Adult Parole Authority*, Case No. C2-94-892. (A-41). The magistrate judge's report and recommendation, granting petitioners' motion for judgment on the pleadings on June 20, 1995, is unreported. *Eugene Woodard v. Ohio Adult Parole Authority*, Case No. C2-94-892. (A-43).

JURISDICTIONAL STATEMENT

The opinion of the United States Court of Appeals for the Sixth Circuit was entered on March 3, 1997. (A-1). Jurisdiction exists under 28 U.S.C. section 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Ohio's Death Penalty Clemency Procedure:

I. *AUTHORITY*

This policy is issued in compliance with Ohio Revised Code 5120.01 which delegates to the Director of the Department of Rehabilitation and Correction authority to manage all Divisions and Institutions of the Department and to establish such rules and regulations as he prescribes.

II. *PURPOSE*

The purpose of this policy is to establish a standard procedure for handling applications for clemency in death penalty cases and for review of death penalty cases where no application has been filed.

III. *APPLICABILITY*

This policy applies to the Ohio Parole Board and other employees of the Ohio Department of Rehabilitation and Correction, who are responsible for collecting and providing information, scheduling hearings, providing notices, etc., and to prisoners under sentence of death and the attorneys representing them.

IV. *DEFINITIONS*

None.

V. *POLICY*

It is the policy of the Ohio Department of Rehabilitation and Correction to fulfill its duties related to the executive clemency process in a manner that is expeditious and is fair to the condemned prisoner, as well as to the family and friends of the victim and the public at large.

VI. *PROCEDURE*

A. Notification to all condemned inmates of this policy.
   1. All prisoners committed to the Department of Rehabilitation and Correction with a sentence of death

shall be given a copy of this policy.

B. Information gathering and scheduling of the hearing:

1. At the time the Ohio Supreme Court completes its review of a criminal case upon direct appeal, and fixes an execution date, the institution or office of the department receiving notice of such decision shall forward a copy to the Parole Board.
2. Upon receipt of said notice or upon its own initiative, the Parole Board shall request an investigation into the details of the prisoner's offense, prior record and other relevant information.
3. Forty-five days in advance of any scheduled execution date, unless that date has been stayed, the parole board chair will schedule a clemency review to be held at central office. This clemency review will be scheduled to occur approximately twenty-one days prior to the scheduled execution date. The parole board shall send any required notices to the sentencing court, the prosecutor, and the victim's family or representative.
4. The parole board shall also have a notice delivered to the prisoner advising him that he may request to be interviewed in person by one or more parole board members or hearing officers and have the board consider any statements he may make. The parole board will send a copy of this

notice to the office of the public defender or other counsel for the prisoner.

5. Once the clemency review hearing has been scheduled, it shall be completed and a recommendation made to the Governor regardless of any subsequent stay of the execution of the sentence.

C. Interview of prisoner by parole board member or hearing officer.

1. The parole board chair will cause the notice advising that the board will be considering his case for a clemency recommendation to be personally delivered to the prisoner. This notice shall advise him that if he requests it in writing, he will be interviewed by one or more parole board members or hearing officers prior to the board considering his case. The notice shall advise him that he can make the request by noting his desire for the interview on the notice and returning it to the parole board chair. The prisoner will be asked to submit to a psychological or psychiatric evaluation as determined appropriate by the Parole Board.
2. If the prisoner requests the personal interview, the parole board chair will appoint one or more board members or hearing officers to interview the prisoner at the confining institution. Only the prisoner and the person or persons assigned by this parole board

chair shall be present at the interview.

D. Attendance at the hearing:
   1. The hearing will be held at central office during normal business hours.
   2. If the prisoner chose to be interviewed, each of the board members and hearing officers that attended the interview shall attend the hearing to present to the board any information offered by the prisoner.
   3. Attendance by others at the hearing is at the sole discretion of the parole board chair.

E. The nature of the hearing:
   1. At the hearing, the Parole Board will consider all available relevant information including any application for clemency that the prisoner submitted and any statement that he gave to the board members or hearing officers that interviewed him.
   2. The Parole Board shall deliberate and render a decision the day of the hearing if possible.
      Once the decision is made, minutes will be signed by the Parole Board and the decision communicated to the Chief Legal Counsel for the Governor.
   3. Within five (5) business days after the Parole Board's decision, the Governor's Office will receive the written report and recommendation. The Parole Board will notify the prisoner, the prisoner's counsel, the

prosecutor, the victim's representative and the Office of the Attorney General of its recommendation.
   4. A press release shall be prepared by the Public Information Office and made available to the media after the report and recommendation have been delivered to the Office of the Governor.

F. In the event that there is insufficient time before a scheduled execution to utilize the normal information gathering or hearing process, the normal procedure shall not apply. The Parole Board shall assemble as much information as is feasible under the circumstances. Within the discretion of the chairman of the Parole Board, a hearing may be scheduled, provided, however, that there is sufficient time to arrange for the appropriate Parole Board officials to be present and that the necessary parties either receive the legally-required notice or waive such notice. In the event that a hearing is convened, the provisions of this policy governing such hearings shall apply. In the event that no hearing is held, the chairman of the Parole Board may forward an informational report to the office of Chief Legal Counsel for the Governor.

G. In the event that the Parole Board is made aware of information or circumstances not considered in its initial determination, or upon the filing of a subsequent petition on behalf of the condemned prisoner, the Parole Board

may supplement its initial decision and recommendation with such informational update as may be appropriate. At the discretion of the chairman of the Parole Board, a hearing may be convened for this purpose. If such a hearing is convened, it shall be conducted according to the procedures specified in this policy for the initial consideration. Following any updated investigation or hearing, the Parole Board may elect to notify the office of Chief Legal Counsel for the Governor of an informational update to its original decision, or make a new decision and recommendation.

H. At the time of the notice of a hearing to consider clemency under this policy, or any time subsequent, the family of the victim or a representative may be given the opportunity to waive notice of any subsequent hearings or decisions.

Fifth Amendment:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of laws.

STATEMENT OF THE CASE

I. Ohio's Modification To Its Clemency Procedure.

In 1994, a death row inmate failed to receive a stay of execution until just days before his scheduled execution date. Because the inmate was a first federal habeas petitioner and because the existing clemency procedure did not provide a mechanism for providing clemency review before that time, the Ohio Governor faced the prospect of receiving an emergency clemency request from an inmate about whom he had little information. The eleventh-hour nature of the proceedings prompted the Governor to modify the executive clemency review process. Among other things, he made changes to the procedure ensuring that neither he nor his successor would ever again receive a sudden request for clemency from an inmate about whom the Governor knew so little. The impetus for this change of course had little to do with the baseline requirements of the federal Constitution; it was the Governor's desire to exercise his clemency powers in a responsible and deliberate manner.

The 1994 amendments to the clemency process

establish a standard procedure for handling clemency applications in death penalty cases. The process starts after the inmate completes his or her direct review and the Ohio Supreme Court sets an execution date. At that point, the clemency review board begins collecting information about the prisoner's offense, prior record and background. In the event the inmate fails to obtain a stay 45 days prior to the scheduled execution date, the board schedules a clemency review hearing that must be completed 21 days prior to the date of execution. The parole board then notifies the inmate and counsel about the hearing. Once such a hearing has been scheduled -- whenever, that is, the inmate fails to obtain a stay more than 45 days before the execution date -- Ohio requires the clemency review to be completed and a recommendation to be made even though a court later stays the execution.

The notice of this procedure explains to the inmates that they may obtain a clemency interview if they request it in writing. *See* IV (C)(2). If a request is made, one or more parole board members then interviews the inmate before the board conducts a hearing on the application, at which time the board considers all available relevant information. After the hearing the board makes a clemency recommendation and communicates it to the Governor's office. Should new information become available after the parole board's initial recommendation, the board may supply it to the Governor, the board may in its discretion hold another hearing, and the board may alter its initial recommendation. In either event, the Governor retains unfettered discretion in ultimately making the decision whether to grant clemency. Ohio Const., Art. III, § 11.

II. The Underlying Proceedings.

Ohio's new clemency procedure became relevant to

respondent, Eugene Woodard, because of a series of crimes he committed on the evening of June 20, 1990. That night he and three other men intentionally drove a stolen car into another vehicle for the purposes of robbing its occupant. After the collision, Mr. Woodard approached the car and (as identified by an eyewitness at trial) shot the occupant, Mani Akram, a 19 year old college student, in the chest with a handgun. Mr. Akram was dumped from the car and left for dead (he later died from the wound), after which Mr. Woodard and his cohorts stole, stripped and torched the vehicle. In later arguing among themselves over who should get the loot, Mr. Woodard claimed "I should get the radio. I'm the one that shot the guy."

On the basis of this and other evidence, an Ohio jury found Mr. Woodard guilty of several crimes, including aggravated murder committed during the commission of a felony. The jury recommended the death penalty, and the trial court accepted its recommendation. The state court of appeals and the Ohio Supreme Court affirmed this decision, and this Court denied certiorari. *See State v. Woodard*, 1992 WL 84888 (Ohio App. 8th Dist. Apr. 23, 1992); *State v. Woodard*, 68 Ohio St.3d 70 (1993); *Woodard v. Ohio*, 512 U.S. 1246 (1994). On July 18, 1994, after the completion of direct review and in accordance with its normal procedures, the Ohio Supreme Court set Mr. Woodard's execution date for October 7, 1994. Mr. Woodard failed to obtain a stay of execution more than 45 days before his execution date. Accordingly, on September 6, 1994, the parole board notified counsel for Woodard about the clemency process and informed him that he could obtain a clemency interview (if he so desired) on September 9, 1994. The board also notified Mr. Woodard that his clemency hearing would be scheduled for September 16, 1994, twenty one days before his scheduled execution date.

On September 14, 1994, Mr. Woodard filed this complaint. He alleged that the new clemency procedure denied him due process, equal protection, as well as the right to remain silent, to be represented by counsel, and to be free of cruel and unusual punishment. On September 16, 1994, the parties entered into a consent decree whereby the clemency review was postponed and would not be rescheduled during the pendency of this suit without 30 days notice to the district court and counsel. Woodard was never interviewed. On June 20, 1995, the magistrate judge issued a report and recommendation granting the State judgment on the pleadings. (A-43). After entertaining respondent's objections to the report, the district court adopted the report and recommendation and granted the State's motion for judgment on the pleadings. (A-41).

Respondent appealed to the United States Court of Appeals for the Sixth Circuit. On March 3, 1997, the Sixth Circuit (Merritt, Nelson (dissent), *Moore*) reversed. (A-1). The court first agreed with the State that Woodard could not establish a protected life or liberty interest in the clemency procedure itself, relying on *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458 (1981). (A-4). But the court then held that clemency played a part in Ohio's overall scheme of prosecution and punishment, and concluded that the clemency procedure therefore had to be reviewed under a separate "strand" of due process recognized in *Evitts v. Lucey*, 469 U.S. 387 (1985) (holding that due process guarantees a criminal defendant the right of effective counsel on his first appeal as of right). (A-12). Next, the court found that the voluntary uncounseled clemency interview established an unconstitutional condition, violating Mr. Woodard's Fifth Amendment privilege against self-incrimination. The court denied all other claims properly before it. In light of its decision, the court remanded the case to the district court to conduct a due process review of Ohio's clemency procedure

and to determine if an unconstitutional condition existed under the court of appeals' analysis.

Judge Merritt concurred in both prongs of the above analysis, while Judge Nelson dissented. Judge Nelson first found the dispute indistinguishable from *Dumschat* and accordingly could not understand how *Evitts* or and other precedent established additional limitations on Ohio's clemency procedure. Clemency decisions, he emphasized, were rarely, if ever, appropriate subjects for judicial review under *Dumschat*, a teaching he found hard to reconcile with the court's analysis. Judge Nelson next thought that the challenged regulation in no way required a waiver of the Fifth Amendment privilege against self-incrimination because the inmate who requests a clemency interview remains free to say as much or as little at the interview as he wishes.

REASONS FOR GRANTING THE WRIT

The decision below contains two exceedingly important interpretations of federal law, each inconsistent with decisions of this and other Courts and each with far-reaching consequences if left unreviewed. The first part of the decision threatens to undo decades of precedent concerning the wide discretion available to the States in establishing executive clemency procedures. Because each of the 38 States that has a death-penalty statute also has a clemency procedure and because the Sixth Circuit's interpretation of the due process requirements for clemency diverges from decisions of this Court and several lower-court decisions, the question warrants prompt review.

The second part of the decision is no less important. In holding that a clemency procedure affording inmates an optional voluntary interview places an unconstitutional condition on the inmate's Fifth Amendment rights, the lower

court has marked a new path in federal law, one rife with potential for misuse. The Sixth Circuit's reasoning effectively threatens all state and federal procedures that use this form of potential benefit -- sentencing procedures, allocution, parole and probation proceedings, and the right to testify at trial. Like the first issue, it should be promptly reviewed.

I. EXECUTIVE CLEMENCY DOES NOT COME WITHIN THE *EVITTS* DUE PROCESS LIMITATIONS ON A STATE'S OVERALL SCHEME OF ADJUDICATION OF CRIMES AND PUNISHMENT.

A. The Decision Below Directly Undermines One Precedent Of This Court And Improperly Expands Another.

In the decision below, the Sixth Circuit held that two "strands" of due process analysis govern a State's exercise of the power of executive clemency. *Woodard v. Ohio Adult Parole Authority*, 107 F.3d 1178 (6th Cir. 1997). The first strand, the court held, places no limitation on Ohio's current clemency procedure in this instance. *See Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458 (1981). But the second strand, the court concluded, separately does limit that procedure on the view that Ohio's executive clemency represents a part of the scheme for adjudicating crimes and punishment limited by *Evitts v. Lucey*, 469 U.S. 387 (1985). That is mistaken. The lower court's attempt to respect *Evitts* improperly slights *Dumschat*.

In *Dumschat*, the inmate made a similar claim that due process limits a State's exercise of its clemency power. In particular, because the State routinely granted clemency to 75% of the individuals with life sentences, he claimed that

State had to provide reasons for denying him clemency. The Court disagreed. It held that where the decisionmaker has unfettered discretion in the exercise of a power, as in clemency, no due process liberty interest exists. A constitutional interest, the Court held, cannot be created out of a mere "unilateral hope." *Dumschat*, 452 U.S. at 465. For these reasons, *Dumschat* concluded that clemency has "not traditionally been the business of the courts; as such, they are rarely, if ever, appropriate subjects for judicial review." *Id.* at 464 (citing *Meachum v. Fano*, 427 U.S. 215 (225) (1976)) (footnote omitted). *See also Jago v. Van Curen*, 454 U.S. 14 (1981) (per curiam).

The source of the lower court's second strand of due process analysis, *Evitts v. Lucey*, did not involve executive clemency. It presented the question whether due process guarantees a criminal defendant effective assistance of counsel on his first appeal as of right. Relying on *Douglas v. California*, 372 U.S. 353 (1963), which held that a criminal defendant has a right to counsel on direct appeal, *Evitts* concluded that the right to counsel necessarily includes the right to effective counsel. That conclusion, however, by no means warrants an extension of the requirements of due process in the area of executive clemency. Unlike a clemency proceeding, a first appeal of right plainly does play a part in the State's overall system for prosecuting and punishing those who disobey its laws. The discretionary nature of clemency has no counterpart in a first appeal of right or in any of the other components of the direct review of a criminal conviction. Perhaps most importantly, this extension of *Evitts* to the clemency setting necessarily contracts the discretion given to the States in this area under *Dumschat*. As the judgment in this case well illustrates, Ohio is entitled to judgment as a matter of law under *Dumschat* but must undergo further scrutiny in this case (and presumably all other death penalty cases until the issue is

resolved) under the *Evitts* rationale.

Dumschat, then, presented facts conspicuously similar to those here. And, if more than one strand of due process analysis potentially applies to a State's discretionary clemency procedure, that was no less true in *Dumschat* than it is today. Yet *Dumschat* held that clemency decisions are "rarely, if ever, appropriate subjects for judicial review." 452 U.S. at 464. Of course the Sixth Circuit may be right in concluding that a second strand of due process analysis applies to clemency decisions after *Evitts*. But right or wrong, such a new doctrine of federal clemency law ought to be reviewed promptly lest well-meaning clemency procedures bottleneck future enforcement of the death penalty statutes adopted by the citizens of 38 States or perhaps lead to the unintended consequence of diminishing the availability of a discretionary clemency procedure in the first instance. In the end, whether one calls the court's conclusion an expansion of a separate strand of due process analysis into the clemency arena (*Evitts*) or a contraction of the only previously-known strand for assessing due process limitations on clemency (*Dumschat*), the result is the same: The court has curbed the normal discretion the federal judiciary gives to the State executive branch's exercise of clemency. This sizeable expansion of federal review over such a critical State sovereign function, we respectfully submit, ought to be reviewed immediately.

B. The Decision Below Conflicts With Decisions From Several Other Circuits.

Not surprisingly, in view of the Sixth Circuit's departure from the *Dumschat* framework, the decision conflicts with several lower-court decisions as well. This, too, supports the petition.

Since *Dumschat*, the lower courts have faced similar challenges to State clemency procedures. Yet none of these challenges led to a decision holding that clemency constituted a part of the State's procedure for prosecution and punishment, requiring additional due process review and ultimately the federalization of the clemency process. On the contrary, they all directly conflict with the Sixth Circuit's analysis and follow the traditional teachings of *Dumschat*. *See Joubert v. Nebraska Board of Pardons*, 87 F.3d 966 (8th Cir. 1996) (holding that there is no constitutionally protected interest in how the Nebraska Board of Pardons reviews a clemency request or in having unbiased decisionmakers on the Board; right to clemency not violated when decisionmaker is predisposed); *Bundy v. Dugger*, 850 F.2d 1402, 1423-24 (5th Cir. 1988) (no protected due process interest where decision process is wholly a matter of executive discretion; clemency thus does not implicate the same punishment concerns as trial); *Huggins v. Isenbarger*, 798 F.2d 203, 205 (7th Cir. 1986) (liberty interest in clemency only exists when the decision depends solely on the "application of rules to facts. To the extent a request appeals to discretion rather than rules, there is no protected interest."); *Smith v. Snow*, 722 F.2d 630, 631-32 (11th Cir. 1983) ("Because the Georgia Parole Board's power to commute penalties is also completely discretionary, *Dumschat* is clearly controlling here and dictates the rejection of Smith's due process claim.") (citation omitted).

The above lower-court cases, together with the many others that follow *Dumschat*, diverge sharply from the Sixth Circuit's decision. To the State's knowledge, in fact, no lower court has rejected a clemency claim under *Dumschat*, then approved that same claim under an extension of *Evitts*. The conflict warrants resolution.

C. The Issue Presented Is National in Scope And Vital In Nature.

As an initial matter, the lower-court decision immediately affects Ohio, Kentucky, Tennessee and Michigan, the States covered by the Sixth Circuit. Their interest alone is not insignificant. Not one death penalty has been carried out by a Sixth Circuit State since each of them (except Michigan) reenacted their death penalty statutes in the aftermath of *Gregg v. Georgia*, 428 U.S. 153 (1976). Thus, in the years since then, not a single one of these statutes has been enforced. By making executive clemency part of the "overall scheme of prosecution and punishment" (A-12), the Sixth Circuit has provided a new vehicle for adding several more years to this conspicuous delay. Today, the courts must review Ohio's clemency procedure to determine if in addition to complying with *Dumschat* it also complies with *Evitts*. (A-12). Tomorrow, Kentucky and Tennessee can anticipate similar challenges. And, after that, presumably all death-row inmates in the three States will seek stays in order to join in these pending challenges. That is a recipe for several years of stay-induced delay.

Nor is this problem one confined to the States in the Sixth Circuit. In light of the Sixth Circuit's new analysis, it would border on malpractice not to challenge the executive clemency process under this additional strand of due process protection in the 35 other States having death-penalty statutes. As more and more inmates reach the end of the state appeal and federal habeas process, they will assuredly look to clemency challenges as another way to detour finality and advance delay.

Each of the above explanations for granting the writ assumes (perhaps unfairly) that the Sixth Circuit erred. But even if one is inclined that the Sixth Circuit accurately

interpreted *Evitts* and *Dumschat*, that is no reason for waiting longer to review the issue. On the contrary, initial agreement with the Sixth Circuit presents perhaps the strongest case for reviewing the issue immediately. To the State's knowledge, as noted, no other circuit in the country has mandated an independent *Evitts* due process review of a State's clemency procedure. Under these circumstances, it would seem, the States *and* the death-row inmates in the other circuits would desire immediate review of this important issue. All things considered, this component of the decision merits immediate review. It conflicts with decisions of this Court, it establishes doubt in the lower courts over the reviewability of State executive clemency decisions, and it represents a quintessentially important federal question.

II. THE DECISION BELOW INCORRECTLY ADOPTS, APPLIES AND EXPANDS THE DOCTRINE OF UNCONSTITUTIONAL CONDITIONS IN THE CONTEXT OF STATE EXECUTIVE CLEMENCY DECISIONS.

A. The Decision Below Conflicts With Decisions Of This Court.

The Sixth Circuit also held that a voluntary clemency interview presented the inmate with a "Hobson's choice" -- between participating in the interview procedure and asserting a Fifth Amendment privilege against self incrimination. The alleged choice, the court concluded, rose to the level of an unconstitutional condition.

The first reason for reviewing this portion of the decision is that it conflicts with precedent from this Court. More than two decades ago, in *Crampton v. Ohio*, 402 U.S. 183 (1971), the Court rejected a similar attempt to engraft

the doctrine of unconstitutional conditions onto a State criminal procedure. At issue in *Crampton* was Ohio's single-trial procedure, which then said that a defendant could exercise his right against self incrimination only on the condition that he also surrender his right to testify on the issue of punishment. In rejecting the challenge, the Court noted that the criminal process, like the rest of the legal system, is replete with situations requiring "the making of difficult judgments" as to which course to follow. *Id.* at 213. Thus, "although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose. The threshold question is whether compelling the election impairs to an appreciable extent any of the policies behind the right involved." *Id.* Measured against this modest standard, the Court found no such impairment through a state procedure forcing consistency, namely, a procedure requiring the defendant to choose between remaining silent on both issues or testifying on both issues. *Id.* at 217. The policies underlying the privilege against self-incrimination, the Court concluded, simply are not offended when a defendant yields to the pressure to testify on the issue of punishment. *Id.* at 217. Under these circumstances, it is difficult to see what remains of *Crampton* after the Sixth Circuit's decision. The only difference between the two cases is that *Crampton* involved a procedure -- the process of a criminal trial -- that vests far *less* discretion in the States than executive clemency does.

The Sixth Circuit also failed meaningfully to distinguish *Baxter v. Palmigiano*, 425 U.S. 308 (1975), which also rejected an attempt to apply the doctrine of unconstitutional conditions to a criminal procedure. In *Baxter*, the defendant challenged a State procedure that forced a criminal defendant to choose between (1) waiving his Fifth Amendment privilege to testify at a disciplinary

hearing or (2) remaining silent and having an adverse inference drawn from that silence. The Court upheld the procedure holding that "permitting an adverse inference to be drawn from an inmate's silence at his disciplinary proceedings is not, on its face, an invalid practice." *Id.* at 320. The alleged choice offered here -- between a clemency interview and no interview -- is no different. As Judge Nelson recognized in dissent below, the Ohio procedure is "precisely analogous" to *Baxter*. (A-40). Judge Nelson is right. Nor are *Crampton* and *Baxter* the only precedents in which the Court permitted procedures that forced defendants to choose between exercising one right or another. *See Brown v. United States*, 356 U.S. 148 (1958) (one who takes the stand in his own behalf cannot then claim the privilege against cross-examination on matters reasonably related to the subject matter of his direct examination); *Spencer v. Texas*, 385 U.S. 554 (1967) (a defendant who takes the stand in his own behalf may be impeached by proof of prior convictions or otherwise inadmissible evidence). The Sixth Circuit's divergence from these established precedents independently supports the writ.

B. The Decision Below Implicates A Question of Great National Importance.

Much of the criminal law involves instances in which the defendant must make a difficult choice between pursuing one line of factual development or another or advancing one legal right over another. The right to testify, to use the most obvious example, cannot simultaneously be exercised with the right to remain silent -- and vice versa. Yet under the Sixth Circuit's reasoning, state and federal actors may no longer rely on this long-accepted truth. Removing the opportunity to present defendants with free (albeit difficult) choices undermines authority to allocute at sentencing for a potentially lighter sentence, to plea bargain for a potentially

lighter sentence, to cast light on remaining silent at a prison disciplinary hearing, to force someone to present an alibi defense, or ultimately even to cross-examine individuals that agree to testify at trial. Such a wide-ranging theory of unconstitutional conditions by itself warrants review. Add to this the normal discretion given to the States over clemency, together with the earlier reasons noted for reviewing such issues, and it becomes even more important to review this component of the decision promptly.

CONCLUSION

For the foregoing reasons, the petitioners respectfully request the Court to grant the writ.

Respectfully Submitted,

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Date: May 5, 1997

No. 95-4099

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EUGENE WOODARD,
Plaintiff-Appellant,

v.

OHIO ADULT PAROLE AUTHORITY, et al.,
Defendants-Appellees.

ON APPEAL from the United States District Court for the Southern District of Ohio

Decided and Filed March 3, 1997

Before: MERRITT, NELSON, and MOORE, Circuit Judges.

MOORE, J., delivered the opinion of the court. MERRITT, J. (p. 28), delivered a separate concurring opinion. NELSON, J. (pp. 29-38), delivered a separate opinion concurring in part and dissenting in part.

KAREN NELSON MOORE, Circuit Judge. This is a § 1983 action involving Ohio's death-penalty clemency procedures. Eugene Woodard, a death-row inmate, seeks injunctive relief against the Ohio Adult Parole Authority, arguing that its clemency procedures violate due process and various other constitutional rights. The district court entered a judgment on the pleadings against Woodard, finding his claims to be wholly without merit. Although the court's analysis was not entirely incorrect, its discussion was incomplete and its conclusions, in significant respects, premature. As a result, we vacate the judgment in part and remand for further proceedings.

I. BACKGROUND

The underlying facts associated with Woodard's aggravated murder conviction are not particularly germane to this appeal. Nevertheless, we pause to observe that Woodard apparently killed his victim during a carjacking by him and his accomplices in southeastern Cleveland. *See State v. Woodard*, 623 N.E.2d 75 (Ohio 1993). Woodard was nineteen years old at the time. His conviction and death sentence were affirmed by the Ohio Court of Appeals and Ohio Supreme Court, *see id.*, and the U.S. Supreme Court denied certiorari, *Woodard v. Ohio*, 114 S. Ct. 2770 (1994).

Although the Ohio Supreme Court set October 7, 1994 as Woodard's execution date, a stay was issued on August 24, 1994 so that Woodard could pursue state post-conviction relief. Because the execution was not stayed 45 days in advance, however, the Ohio Adult Parole Authority (APA) initiated the clemency process in his case, notifying his counsel on September 6 that a hearing would be held on September 16. In addition, the APA informed Woodard's attorneys that if he desired a pre-hearing interview with the APA, such an interview would be available on September 9. Woodard's counsel objected to the short notice given by the APA, pointing out that they had only recently been assigned to represent him. Counsel further sought assurances from the APA that any clemency procedures would not interfere with their representation of Woodard—namely, that counsel would be permitted to attend and participate in the scheduled interview and hearing. When the APA did not respond, Woodard filed this § 1983 action on September 14, 1994, moving additionally for a temporary restraining order against any clemency procedures in his case. According to Woodard, a premature review would serve as an obstacle to a later, more timely clemency review, because such later review could only be obtained by leave of the APA.

On September 16, a consent decree was filed, postponing the clemency proceedings indefinitely. Defendants then moved for a judgment on the pleadings, stating that Woodard could prove no set of facts to support any of his claims. The magistrate judge to whom the case had been referred agreed, noting that the Governor's broad discretion in making clemency decisions meant that Woodard lacked any protected liberty interest in the clemency procedures which might be subject to due process requirements. The magistrate judge also found that Woodard did not have a substantive due process claim, that the clemency procedures did not violate Woodard's privilege against self-incrimination, that Woodard did not have a right to counsel in the clemency proceedings, and that the Eighth Amendment prohibition against cruel and unusual punishments was not implicated in this case. The magistrate judge did not address Woodard's additional equal protection and Ninth Amendment arguments. Despite objection, the district court adopted the magistrate judge's report and recommendation in full and entered judgment against Woodard. This appeal followed.

II. PROCEDURAL DUE PROCESS

We start with what is undoubtedly the most complicated issue in this case: procedural due process. Close scrutiny of Woodard's and amici's briefs reveals that there are actually two kinds of procedural due process arguments to be extracted therefrom, although these arguments are hardly apparent at first glance: one relates to the deprivation of a life or liberty interest arising from the clemency procedures themselves; the other deals with the general deprivation of life or liberty that begins with the initial criminal prosecution and ends with the clemency decision. In the first type of argument, the inquiry focuses on whether a life or liberty interest exists in clemency and whether it has been deprived by the clemency procedures. In the second, the question is

the degree to which the clemency procedures play a necessary role in the state's overall scheme of prosecution and punishment. Given the opacity of these abstract formulations, it is understandable that the district court only recognized the first approach—in our view, the one less helpful to Woodard. As these concepts require further explanation, we set forth our analysis in some detail, beginning with basic doctrine.

A. Deprivation of a Life or Liberty Interest in the Clemency Procedures Themselves

1. *Basic Doctrine*

When a state acts to deprive someone of his or her interest in life, liberty, or property, that deprivation must take place in accordance with due process of law. *See* U.S. CONST. amend. XIV, § 1. Three questions are thus instantly generated for any given situation: (1) is there a life, liberty, or property interest at stake here? (2) is there a deprivation of that protected interest? and (3) if so, what process is due? Sometimes, a state will do something disadvantageous to an individual by, for example, summarily terminating his employment or suddenly moving her from a prison to a mental hospital. The question whether a protected property or liberty interest exists in such instances of deprivation is the threshold inquiry, and according to prevailing doctrine, state law controls as to the existence of a property interest. *See, e.g., Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538-41 (1985) (termination of public employment); *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 9-12 (1978) (termination of utility service). As to whether there is a liberty interest at stake, however, the Supreme Court has made it clear that both state law and the Due Process Clause itself may create such an interest. *See Sandin v. Conner*, 15 S. Ct. 2293, 2297-2302 (1995) (transfer from Hawaii prison to California prison); *see also* RICHARD

FALLON, DANIEL MELTZER & DAVID SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 557-62 (4th ed. 1996). According to the Court, a liberty interest may arise from federal law when the change in a prisoner's situation is "not within the range of conditions of confinement to which a prison sentence subjects an individual"—that is, when it is "qualitatively different from the punishment characteristically suffered by a person convicted of crime." *Olim v. Wakinekona*, 461 U.S. 238, 245 (1983) (quoting *Vliek v. Jones*, 445 U.S. 480, 493 (1980)). In addition, state procedures may create liberty interests that are deprived when a state actor deviates from these procedures. *Sandin*, 115 S. Ct. at 2299-2301. Of course, even though state law plays a role in determining the existence of property or liberty interests, the ultimate question of the degree of due process protection to be afforded under the Constitution remains a federal one.

Usually, disputes over "liberty" interests arise in the prison context, where some change in the circumstances of incarceration forms the basis for a due process claim. Although it provides the most common ground for complaint, the change does not always have to involve a transfer from one type of imprisonment to another. In *Wolff v. McDonnell*, 418 U.S. 539 (1974), inmates challenged the prison authorities' summary revocation of good time credits. In *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458 (1981), plaintiffs sought a declaratory judgment that the Connecticut board's commutation and pardon procedures did not comport with procedural due process.

2. *The Existence of a Federally Created Life or Liberty Interest*

In this case, Woodard contends that the Ohio clemency procedures are constitutionally defective under the foregoing

framework. His primary difficulty, however, lies in showing the existence of a protected life or liberty interest. First, as far as the Due Process Clause itself is concerned, the Supreme Court has decisively rejected the argument that federal law can create a liberty interest in clemency. *Dumschat*, 452 U.S. at 464-65. According to the Court, "The ground for a constitutional claim, if any, must be found in statutes or other rules defining the obligations of the authority charged with exercising clemency." *Id.* at 465.

Woodard tries to distinguish *Dumschat* by noting that the claimants in that case were only non-capital inmates—that unlike them, he has a more powerful *life* interest at stake in the clemency proceedings. Although Woodard correctly points out that capital punishment is constitutionally unique and that its imposition generally requires extra procedural protections, he is unable to demonstrate how his death sentence can form a principled basis for departing from *Dumschat's* rationale. In *Dumschat*, the Court explained that the claimed liberty interest must derive from the state's actions *after* a valid conviction and sentence. *Id.* at 463-65. In other words, the fact of an inmate's incarceration does not itself give rise to a liberty interest, because it is assumed that the inmate's "original" liberty interest—i.e., the one he possessed before he was arrested, charged, and convicted for his crime—has already been (or is still being) afforded due process: the right to trial, appeal, post-conviction remedies, and similar process. The liberty interest here, after incarceration, must come from actions taken by the state to change the prisoner's present situation, and the question becomes whether procedural due process places any constraints on making that change. Such liberty-affecting change is easiest to see when prison authorities move an inmate from one prison to another, or from a prison to a mental hospital. It is far more difficult to identify when the parole authorities simply alter their mode of dealing with

clemency applications. In the latter case, rather than a tangible, further restraint on one's freedom, the state's action constitutes only a change in a prisoner's expectations concerning the likelihood of a pardon or commutation. As stated by the Court, a "felon's expectation that a lawfully imposed sentence will be commuted or that he will be pardoned is no more substantial than an inmate's expectation, for example, that he will not be transferred to another prison; it is simply a unilateral hope." *Dumschat*, 452 U.S. at 465 (footnote omitted).

The same rationale applies to the life interest claimed by Woodard. Woodard's "original" life interest—his right not to be sentenced to death—is already covered by independent process: his trial, appeal, habeas petitions, and even (as will be discussed in Part II.B below) his clemency application. In order to argue that Ohio's clemency procedure by itself impinges upon a protected life interest, however, he must point to a separate act that might constitute a deprivation of that interest—a separate, life-affecting change in his situation. In this case, the change is no different from that in *Dumschat*. It is just a change in expectation as to the possibility of having his sentence commuted.

Woodard also tries to distinguish *Dumschat* by arguing that the asserted life and liberty interest here is not in being granted clemency, but in having "a meaningful clemency procedure." Appellant's Br. at 6. This argument makes the error of confusing the liberty or life interest with the process that is due. Woodard can only be entitled to a meaningful procedure, the process that is due, if he first shows the deprivation of a protected constitutional interest—life, liberty, or property. The protected interest cannot be the process itself. In *Dumschat*, the plaintiffs also sought "meaningful" clemency procedures—including a statement of reasons for the parole board's decision—but the Court made it plain that

the Constitution gave them no right to such procedures until they could first demonstrate a cognizable liberty interest. *Id.* at 463-67.

3. *The Existence of a State-Created Interest*

Woodard next asserts that even if there is no federally created life or liberty interest in clemency, Ohio's statutory scheme creates such an interest. Again, this claim is squarely met by contrary case law. In addition, the Supreme Court's recent decision in *Sandin v. Conner*, 115 S. Ct. 2293 (1995), does not alter our view in this regard.

Pre-*Sandin* doctrine was relatively straightforward. Under that framework, a state could create protected liberty interests "by placing substantive limitations on official discretion." *Olim v. Wakinekona*, 461 U.S. 238, 249 (1983). Thus, if state rules set forth mandatory procedures for prison transfers, and prison officials deviated from those procedures, there might be a deprivation of a state-created liberty interest. On the other hand, if state procedures essentially allowed "unfettered discretion" in making the ultimate decision, no constitutionally protected liberty interest would be created, even if some of the procedures leading up to the final decision might be couched in mandatory terms. *Id.* at 249-50; *see also Sweeton v. Brown*, 27 F.3d 1162, 1164-65 (6th Cir. 1994) (en banc) (following *Olim*), *cert. denied*, 115 S. Ct. 1118 (1995). In all material respects, this case is indistinguishable from *Olim*. Although Woodard and the ACLU place great emphasis on the fact that the Governor of Ohio must wait for a recommendation from the APA before making a decision,[1] the critical point, which even

[1]In *State ex rel. Maurer v. Sheward*, 644 N.E.2d 369 (Ohio 1994), the Ohio Supreme Court invalidated a pardon granted by Governor Richard Celeste, because Celeste had failed to wait for an APA recommendation as required by statute. The court simultaneously upheld eight statutorily "premature" commutations by Celeste, because the court concluded that the Ohio Constitution only allowed the General Assembly to place procedural restrictions on the Governor's pardon power, not the power to grant reprieves or commutations.

In 1995, the Ohio Constitution was amended by referendum, allowing the General Assembly to make the Governor follow additional procedures before granting commutations, as well as pardons. *See* Ohio Const. art. III, § 11.

Although the cumulative effect of these changes can only be to make the granting of clemency slightly more difficult (at least as a practical and political matter), it is clear that there is still no substantive restriction on the Governor's discretion.

Woodard acknowledges, is that the Governor "is not bound by the Ohio APA's recommendation." Appellant's Br. at 23. Under *Olim*, it does not matter whether the APA must follow elaborate, mandatory procedures, and it does not matter whether the APA's recommendation is itself discretionary or tightly regulated. The only thing that counts is that there are "no standards governing the [final decisionmaker's] exercise of his discretion." *Olim*, 461 U.S. at 243, 249-50. In Ohio, the final decisionmaker's discretion is entirely "unfettered."

Sandin has now modified this analysis, although its ultimate effect on the pre-existing framework remains uncertain. Faced with a situation involving mandatory prison regulations, the Supreme Court in *Sandin* decided to change course, holding that the mandatory/discretionary distinction which had been developed in prior decisions would no longer be controlling. According to the Court, the case law delineating the mandatory/discretionary rubric "has produced at least two undesirable effects. First, it creates disincentives

for States to codify prison management procedures in the interest of uniform treatment. . . . Second, the . . . approach has led to the involvement of federal courts in the day-to-day management of prisons, often squandering judicial resources with little offsetting benefit to anyone." *Sandin*, 115 S. Ct. at 2299. As a result, the *Sandin* Court formulated a new approach, which continued to "recognize that States may under certain circumstances create liberty interests which are protected by the Due Process Clause," but cautioned that these interests would "be generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, . . . nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Id.* at 2300 (citations omitted). Stated differently, the prison authorities' actions would need to "present a dramatic departure from the basic conditions of [the inmate's] sentence." *Id.* at 2301.

Notably absent from the Court's opinion is any explanation as to how a state might actually create these liberty interests. As a result, it remains unclear whether the Court intended to eliminate the mandatory/discretionary distinction altogether, looking to alternate means of protecting "atypical and significant" hardships under state law, *see Sandin*, 115 S. Ct. at 2306 (Breyer, J., dissenting) (expressing uncertainty as to the majority's intent), or whether the Court simply intended to set up a further requirement for forming state-law liberty interests, making mandatory language in state procedures a necessary but no longer sufficient condition in finding such interests. *See id.*; RICHARD FALLON, DANIEL MELTZER & DAVID SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 560-61 (4th ed. 1996). Under the latter interpretation, there would be no change to our analysis of Woodard's situation under *Olim*, because the final

decisionmaker's discretion in Ohio remains uncabined. Under the former interpretation, we would no longer be able to rest our holding on *Olim*, but we would still conclude that Woodard is not entitled to relief. Even if state law can recognize and create liberty interests through means other than mandatory or discretionary language, it cannot be said that a change in a prisoner's expectations regarding the likelihood of being granted clemency may be deemed an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life," *Sandin*, 115 S. Ct. at 2300, given that the Supreme Court has already effectively held, in *Dumschat*, that such an expectation is not "qualitatively different from the punishment characteristically suffered by a person convicted of crime," *Vitek v. Jones*, 445 U.S. 480, 493 (1980), and given that the *Sandin* Court did not even consider the harsh change in conditions presented in its own case—disciplinary, segregated confinement for 30 days—to impose an "atypical and significant hardship." In short, we do not need to decide which of these interpretations of *Sandin* is the correct one, as Woodard is simply unable to prevail under either.

Because Woodard cannot demonstrate the existence of a protected life or liberty interest arising from the clemency procedures themselves, this first strand of procedural due process analysis is ultimately of little assistance to him. Also, because no such interest exists, it remains unnecessary for us to reach the question of what process might be due.

B. The Role of Clemency in the Overall Scheme of Adjudication

In our view, the district court's focus on the foregoing strand of due process analysis, though analytically correct, as far as it goes, indicates that the court did not take account of the second strand—an approach that centers on the role of

clemency in the entire punitive scheme. Under this approach, the district court should not have held that Woodard was entirely without a procedural due process claim. The court should have identified Woodard's "original" life and liberty interests under *Evitts v. Lucey*, 469 U.S. 387 (1985), and it should then have proceeded to an inquiry of the degree of process that would be due.

As mentioned in Part II.A.2 above, Woodard has always had "original" liberty and life interests in not being imprisoned and in not being executed by the state. These interests could only be deprived with due process of law, which at a minimum would include the choice of having a trial conducted in accordance with the Sixth Amendment. *See* U.S. CONST. amend. VI. The Constitution does not require a state also to provide a system of appeals, but if the state chooses to do so, the appeal, too, must comply with the basic requirements of due process. *Evitts*, 469 U.S. at 393. As stated in *Evitts*: "[I]f a State has created appellate courts as 'an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant,' the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution." *Id.* (quoting *Griffin v. Illinois*, 351 U.S. 12, 18 (1956)). As this circuit has observed:

> Implicit in this conclusion is the idea that the enactment of an appellate system necessarily "alter[s] the balance between the layers of adjudication in a constitutionally significant manner" . . . . That is, the introduction of a second tier of adjudication unavoidably affects the operation and significance of the first tier. For this reason, due process places constraints on an appeal even if it does not require an appeal in the first place. The appeal forms an

> "integral" and inextricable part of the procedures for determining whether a defendant should be deprived of his life, liberty, or property.

United States v. Smith, 94 F.3d 204, 207 (6th Cir. 1996) (citation omitted), *cert. denied*, ____ S. Ct. ____, 1996 WL 757264 (Feb. 18, 1997) (No. 96-7259).

This reasoning logically applies to further proceedings made available by the government, as well: discretionary appeals, post-conviction proceedings, clemency procedures. The degree to which each component forms "an integral part" of the overall adjudicative system determines the degree to which due process plays a role. Of course, the more distant the procedure from initial proceedings, the less stringent the requirements must be. For example, the speedy trial guarantee is well established under the Sixth Amendment, but courts have only recently begun to recognize the right to a speedy criminal *appeal* under the Due Process Clause. *See, e.g., Smith*, 94 F.3d at 206-07. Similarly, a defendant has the right to counsel in the first appeal as of right, *Douglas v. California*, 372 U.S. 353 (1963), but no such right exists in post-conviction proceedings, even for capital defendants. *Murray v. Giarratano*, 492 U.S. 1, 10 (1989).

Should proceedings as far down the line as death-penalty clemency procedures be analyzed under this overall framework? We believe so. Like appeals, clemency procedures are not required by the Due Process Clause, yet all thirty-eight states authorizing capital punishment make provisions for clemency. *See Herrera v. Collins*, 506 U.S. 390, 414 (1993) (noting that "all 36 states" allowing capital punishment at the time had "constitutional or statutory provisions for clemency"); Kan. Const. art. I, § 7, Kan.

Stat. Ann. § 22-3701; N.Y. Const. art. IV, § 4, N.Y. Correct. Law §§ 261-66. Furthermore, as the Supreme Court itself emphasized in *Herrera*, "Clemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted." 506 U.S. at 411-12. Indeed, the Court in *Herrera* explicitly relied on the existence of executive clemency in denying habeas relief to a petitioner claiming "actual innocence." *Id.* at 411-17. Given this clear recognition by the Court of the integral part played by clemency in every state's death-penalty scheme, we find it only rational to apply *Evitts's* principle in equal measure to the clemency procedures. We acknowledge at the same time that the due process at the clemency stage will necessarily be minimal, perhaps even barely perceptible, because of the great distance from the truly fundamental process—the trial, the appeal—and the significant distance from other extremely important process—discretionary appeals and post-conviction petitions.[2]

This gives rise to the question whether an action under 42 U.S.C. § 1983 provides the appropriate vehicle for raising this type of due process claim. In our opinion, it does—more so than a habeas petition under 28 U.S.C. § 2254. In *Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973), the Supreme Court held that a state prisoner challenging the "fact or duration of his physical imprisonment" and seeking "immediate release or a speedier release" would be limited

[2]We assume here that clemency procedures will normally fall last in line, as a final recourse for prisoners who have expanded all possible effort in the courthouse, even though such procedures are certainly flexible enough to be pushed forward in line. For instance, state authorities in this case attempted to hold the clemency proceedings while Woodard's state post-conviction petition was still in its initial stages.

to in his federal remedies to a writ of habeas corpus. *Preiser* is distinguishable from the instant case, however, because Woodard "is not claiming that he is entitled to clemency or that the [APA] should have granted his request. Instead, he is challenging only the process by which the [APA would consider] his request for clemency. . . ." *Oley v. Hopkins*, 5 F.3d 1125, 1131 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 2768 (1994). Indeed, the Court in *Preiser* itself suggested that a § 1983 action would be the proper approach if the prisoner were "attacking something other than the fact or length" of his sentence and "seeking something other than immediate or more speedy release—the traditional purpose of habeas corpus." 411 U.S. at 494. Consequently, notwithstanding the interrelationship between successive stages of adjudication under *Evitts*, it is an injunction under § 1983 that provides the more suitable means of reforming the clemency procedures, where the prisoner is not directly laying claim to clemency itself, or any other form of instant relief from his sentence. As stated by the Eighth Circuit in *Oley*, "This is not the stuff of redress which can be sought under § 2254." 5 F.3d at 1131.

We come, then, to the ultimate question: how much process is due? It appears that a court must ultimately address in this constitutional question by making a normative judgment about functions of various procedures—e.g., what counts as a "trial"? what are the minimum requirements for an "appeal"?—something for which there is very little guidance by the time we arrive at clemency procedures. In *Evitts*, the Court used the touchstone found in *Douglas v. California*, 372 U.S. at 358, for the first appeal as of right: whether the appeal would be a "meaningless ritual" without the claimed procedural entitlement. 469 U.S. at 394. In *Evitts*, the Court decided that an appeal without the effective assistance of counsel would be one such meaningless ritual. In *United States v. Smith*, this circuit employed the same principle in

recognizing the right to a speedy criminal appeal, noting that excessive delay could also render an appeal "meaningless" for all practical purposes. 94 F.3d at 207-08.

In clemency, we are confronted with procedures that are frequently informal and almost always overwhelmingly discretionary. Once a state chooses to adopt a clemency process, what are the minimum characteristics to be expected? What goes into a baseline "death-penalty clemency procedure"? These are delicate questions, which courts—and especially federal courts—should approach with great caution and deference. Nevertheless, it is not too difficult to imagine extreme situations in which federal due process would be offended. For example, a procedure in which a governor or parole board merely pulled names out of a lottery bin or flipped coins to make clemency decisions would undoubtedly constitute a "meaningless ritual." Similarly, a death-penalty "clemency hearing" occurring immediately after conviction but before commencement of a defendant's sentencing proceedings would be almost equally without meaning.

In this case, Woodard argues that the APA's current procedures provide inadequate notice and opportunity to be heard, for a number of reasons. We decline to address his specific due process arguments at this time, however, because we conclude that this case must in any event be remanded to the district court for additional proceedings on Woodard's Fifth Amendment claim (discussed in Part III below). Because the district court did not consider this second strand of procedural due process analysis, holding instead that the Fourteenth Amendment was completely inapplicable to the state's clemency proceedings, we believe that the district court should be given the opportunity to address this due process claim in the first instance. On remand, the district court should analyze Woodard's specific

arguments under *Evitts* and the principles outlined above, keeping in mind that the clemency procedure is not necessarily a formal, adversarial proceedings, and that the APA is generally free to decide what sources of information and evidence would best serve its informal investigation. Whether or not the district court ultimately finds merit in Woodard's due process contentions, it is undeniably better equipped to be the first to evaluate them, as we are limited on this appeal to consideration of the parties' bare pleadings.

III. THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION

Woodard claims that the APA's clemency interview procedure burdens his privilege against self-incrimination because it provides for a private, uncounseled interview without a guarantee of immunity for the things he might say. The district court ruled that no such burden exists here because the interview is completely voluntary, an optional procedure that Woodard is free to accept or decline. In so holding, the court cited *Simmons v. United States*, 390 U.S. 377, 389-94 (1968), but *Simmons* does not provide any support for that conclusion. More important, the district court did not consider whether the interview procedure might impose an unconstitutional condition on one of Woodard's fundamental rights.

A. The Doctrine of Unconstitutional Conditions

On appeal, the Ohio Death Penalty Task Force's amicus brief argues that under *Simmons*, the APA should be required to modify its interview procedure so as not to violate the Fifth Amendment (applicable to the states via the Fourteenth Amendment). *Simmons*, however, involved a situation in which the defendant was forced to choose between pressing a Fourth Amendment claim and asserting his Fifth

Amendment privilege against self-incrimination. According to the Supreme Court, this situation was "intolerable" because an "undeniable tension" had been created between two constitutional rights. 390 U.S. at 394. The instant case, on the other hand, presents no such tension—the only constitutional right at issue is Woodard's Fifth Amendment privilege. Consequently, we are not persuaded that *Simmons* by itself provides a basis for reversing the district court's judgment.

Instead, we are drawn to Woodard's argument that the Ohio procedure calls for death-row inmates to make a "Hobson's choice" between asserting the Fifth Amendment right and participating in the clemency review process.[3] This raises the specter of an unconstitutional condition, something which the district court did not address, and something which we believe now requires us to remand the case.

As explained by a leading commentator, "The doctrine of unconstitutional conditions holds that government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether. It reflects the triumph of the view that government may not do indirectly what it may not do directly over the view that the greater power to deny a benefit includes the lesser power to impose a condition on its

[3]We are instructed by the Ninth Circuit that "[t]he phrase 'Hobson's choice' is often used incorrectly. The phrase comes from Thomas Hobson, an English liveryman who required every customer to choose the horse nearest the door. . . . A Hobson's choice is thus an apparently free choice when there is no real alternative. . . . Here, however [plaintiff] technically was not confronted with a Hobson's choice—rather, [plaintiff] was forced to choose between two harmful options." *Wang v. Reno*, 81 F.3d 808, 813 n.5 (9th Cir. 1996) (citations omitted).

receipt." Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413, 1415 (1989). In every respect, Ohio's clemency interview procedure appears to fall within the doctrine's parameters. In Woodard's case, the "benefit" is the uncounseled clemency interview, and the "unconstitutional condition" is the requirement that he waive his Fifth Amendment right against self-incrimination.[4] The clemency interview undoubtedly presents a serious matter for Woodard, whose life may literally depend upon it, yet in deciding between this interview and the risk of self-incrimination, Woodard has been offered a choice by the state that can hardly be deemed a constitutionally encumbered one.

Once applied, the doctrine requires a court to employ strict scrutiny in analyzing the challenged condition. *See Shapiro v. Thompson*, 394 U.S. 618, 629-33 (1969). At this stage, with little evidence before us, there does not appear to be any compelling state interest in requiring waiver of Fifth Amendment rights by clemency interviewees. Indeed, it would seem to be in the state's own interest to encourage an open and frank interview, as far as this is possible, in order to help it decide whether mercy is ultimately appropriate. By the same token, a prisoner who still has ongoing post-conviction proceedings (such as Woodard) obviously has a measurable interest in avoiding self-incrimination. And there is always the possibility that a prisoner might be granted clemency but then be charged with different crimes that are revealed during the interview. As a result, unless a

[4]Of course, at this juncture, we cannot be certain that the defendants would actually impose this condition. However, they have not denied that they would, and we must accept all of the plaintiff's allegations as true in reviewing this judgment on the pleadings. *See Astor v. International Business Machines Corp.*, 7 F.3d 533, 538 (6th Cir. 1993).

compelling reason can be brought forward which counsels against applying the doctrine, we would hold that Woodard has raised a colorable unconstitutional conditions claim regarding the interview procedure, and we would vacate the judgment of the district court.

B. Problems in Applying the Doctrine

A number of reasonable objections might be raised against finding an unconstitutional condition. Although these arguments are certainly worthy of careful consideration, in the end they do not dissuade us from favoring an application of the doctrine. We consider these arguments in turn.

1. *The Clemency Interview As a "Benefit"*

First, there is the idea that the only possible "benefit" to Woodard is clemency itself. Therefore, the interview procedure does not pose as unconstitutional condition because it is just an optional event—i.e., even if Woodard were given the type of interview he wanted, he still might not get clemency, in which case the interview will have been worthless. There are two possible responses to this.

One, the interview may indeed be a benefit because it dramatically increases Woodard's chances of being granted clemency. Although we are not in a position to evaluate this hypothesis ourselves at this time, Woodard could conceivably produce evidence on remand that all, or the overwhelming majority, of the prisoners granted clemency were those who took advantage of the "optional" interview. In such event, the district court would be hard-pressed not to find a benefit in the interview.

Two, it is not entirely true that the interview is worthless without an actual grant of clemency. Giving Woodard the type of interview he desires—an open and frank discussion

with no danger of self-incrimination—would give Woodard the sense that he had participated meaningfully in the process, even if he were ultimately denied clemency. On these terms, the interview procedure may also be deemed a benefit.

In short, the interview has both *instrumental* and *intrinsic* value. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 663-77 (1988). Whether we accept one or both of these grounds, the argument that the interview is not a "benefit" deserves, at the very least, a remand.

2. *Applicability of the Doctrine in this Constitutional Context*

A more difficult question is whether the unconstitutional conditions doctrine should apply in the context of the Fifth Amendment. In general, the doctrine has only consistently been applied to protect First Amendment rights. *See, e.g., Board of County Comm'rs v. Umbehr,* 116 S. Ct. 2342 (1996) (free speech); *FCC v. League of Women Voters*, 468 U.S. 364 (1984) (free speech); *Sherbert v. Verner*, 374 U.S. 398 (1963) (Free Exercise Clause); *Speiser v. Randall*, 357 U.S. 513 (1958) (free speech); *see also Dolan v. City of Tigard*, 512 U.S. 374, ---, 114 S. Ct. 2309, 2328 (1994) (Stevens, J., dissenting) (doctrine "especially" protects freedom of speech). Nevertheless, the Supreme Court has also employed it sporadically in other areas. *See Dolan*, 114 S. Ct. at 2317 (Takings Clause); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (Takings Clause). Indeed, in *Shapiro v. Thompson*, 394 U.S. 618, 629-31 (1969), the Court even held that conditioning welfare benefits on residency requirements impermissibly burdened the fundamental right of interstate travel. We are unable to discern any logical reason for holding the doctrine inapplicable to the Fifth Amendment here.

The doctrine can certainly be characterized as "unruly." Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 Harv. L. Rev. 4, 13 (1988). As Professor Sullivan similarly observes, the Supreme Court's recent jurisprudence seems "a minefield to be traversed gingerly." Sullivan, 102 Harv. L. Rev. at 1415. However, it appears that much of the confusion surrounding the doctrine has focused on the "elusive distinction between withholding a subsidy and imposing a penalty." TRIBE, AMERICAN CONSTITUTIONAL LAW 781-84; *see also* Sullivan, 102 Harv. L. Rev. at 1439-42. In this area of confusion, the government may not *penalize* the exercise of a constitutional right, but the government retains the power to subsidize or encourage certain activities under its spending power. The trouble arises when by subsidizing one activity, the government is by negative implication penalizing another, and the "another" happens to involve a constitutional right. *Compare FCC v. League of Women Voters*, 468 U.S. 364, 399-401 (1984) *with Regan v. Taxation with Representation*, 461 U.S. 540, 544-46 (1983).

The same problem is not present in the instant case. We are not dealing with monetary subsidies or tax exemptions by the government. The government cannot be said here to have a legitimate purpose in limiting its "encouragement" of clemency interviews to those inmates who relinquish their Fifth Amendment rights. For that reason, this case might perhaps be described as a "purer," and therefore easier, case of an unconstitutional condition—similar to the Supreme Court's Takings Clause cases, whether the benefits, zoning permits, are also non-monetary and (at least theoretically) unlimited. Indeed, in *Dolan*, the most recent Takings Clause decision addressing the issue, the Court describes the unconstitutional conditions doctrine as "well-settled." 114 S. Ct. at 2317. In light of this most recent pronouncement, we conclude that a degree of uncertainty in the doctrine is not a

sufficient basis for resisting its application.

3. *Application of the Doctrine in Light of Instances of Waiver of Rights*

The final possible obstacle to application of the unconstitutional conditions doctrine lies in instances where criminal defendants have waived constitutional rights in exchange for "benefits," without any resulting unconstitutional conditions problem. Two instances are particularly salient here: (1) the application of §3B1.1 of the federal Sentencing Guidelines, the "acceptance of responsibility" guideline, and (2) the testimony of defendants at their own criminal trials.

First, the federal courts have continued to uphold the constitutionality of USSG §3B1.1, *see e.g., United States v. Monsour*, 893 F.2d 126; 129 (6th Cir. 1990), which in many ways poses an unconstitutional condition like the one found in the instant case: the guideline gives defendants the "benefit" of a two-point or three-point decrease in offense level if they demonstrate "acceptance of responsibility"—that is, if they plead guilty and thereby give up their right to trial and privilege against self-incrimination. *See United States Sentencing Commission, Guidelines Manual*, §3B1.1 (Nov. 1995). How can we reconcile this acceptance of USSG §3B1.1 with the notion that the clemency interview procedure may pose an unconstitutional condition?

Second, in criminal trials generally, defendants retain the option of testifying in their own behalf, but if they do so, they also subject themselves to cross-examination on the witness stand. To a certain extent, this situation could also be characterized in terms of an unconstitutional condition: in order to be granted the "benefit" of testifying in their defense, defendants must give up their Fifth Amendment privilege against self-incrimination. Again, the question

arises whether the unconstitutional conditions doctrine must be rendered inapplicable in this context, and therefore in the similar, clemency-interview context, as well.

We should be careful to refrain from addressing issues not directly related to this case. Nevertheless, we note briefly that a reasonable argument could be made that both USSG §3B1.1 and the trial testimony situation would actually withstand a direct unconstitutional conditions challenge, even as they impinge upon the right against self-incrimination. A court might find what appears to be an unconstitutional condition in each instance, apply strict scrutiny, but ultimately conclude that the condition is narrowly tailored to furthering a compelling government interest. With respect to the sentencing guideline, a court might identify a compelling interest in encouraging a defendant to admit responsibility, first for the sake of rehabilitating the defendant, and second to maintain administrative order in the overcrowded criminal justice system. With respect to a defendant's testimony at trial, a court might conclude that the entire purpose of the defendant's testimony is to serve the truth-seeking function of an adversarial, criminal trial—a purpose that would be subverted if only one side of the story were allowed to be presented. Whereas a trial is specifically designed to determine the guilt or innocence of the defendant—the very subject matter for which the Fifth Amendment right is considered necessary—a clemency review is designed for something very different: to determine whether a prisoner is entitled to the state's mercy—something which may or may not include consideration of the defendant's culpability. For this reason, a defendant who testifies at her own trial may properly be deemed to have waived the right against self-incrimination, whereas no such assumption is warranted for a prisoner who chooses to speak to state officials regarding the possibility of being granted a pardon, commutation, or reprieve.

Furthermore, in the trial testimony instance, the argument could be made that no condition on any constitutional right even exists. Because the prosecution always bears the burden of proving its case, and because non-defendant witnesses are generally subject to the government's subpoena, the fact that distinguishes a defendant from other individuals in a case is his ability *not* to testify and *not* to be subject to questioning by the prosecution. In other words, the primary "benefit" to the defendant is the right to refuse testimony, not the ability to give it. Any benefit enjoyed by a particular defendant in speaking in her own defense is necessarily subordinate to the more important benefit of being able to remain silent while the government attempts to prove its case. Again, that is one of the main protections the Fifth Amendment right was designed to accomplish.

Despite that protection, in *Baxter v. Palmigiano*, 425 U.S. 308 (1976), the Supreme Court upheld the imposition of a choice between waiving the Fifth Amendment privilege to testify at a prison disciplinary hearing, and remaining silent and having an adverse inference drawn from that silence. *Id.* at 316-20. Though the Court did not analyze the issue in terms of a choice, but rather assessed the legality of the adverse inference, *Baxter* does appear on the surface to be analogous to this case. A prison disciplinary hearing, however, serves very different purposes and implicates very different interests than a clemency interview. In a prison disciplinary hearing, as in a criminal proceeding, the burden of proof is on the state; in the clemency process, however, the burden is entirely on the prisoner. A prison disciplinary hearing serves the purpose of determining whether a prisoner has violated prison rules, so that he or she may be punished, while a clemency interview serves the purpose of supporting a prisoner's plea for mercy, so that he or she may be permitted to live or receive leniency. The necessity of speaking openly to the state, therefore, is much greater in the

clemency context than in *Baxter*, and more similar to *Simmons*. *Baxter*, therefore, is clearly distinguishable and does not affect our analysis of the clemency interview.

In the present context it is the prisoner who must demonstrate his eligibility for clemency, and so his refusal to engage in an interview can only in the most improbable of circumstances be considered a benefit. Moreover, there does not appear to be any persuasive reason why the APA should condition the benefit of an uncounseled clemency interview on the waiver of the prisoner's Fifth Amendment right. Whereas the prisoner's interest in trying to obtain clemency appears quite strong, the state's interest in insisting on such a waiver appears comparatively weak. The possibility of damage to a state interest by applying the privilege seems remote, but the prisoner's risk of self-incrimination is significant. Though "an act for which a person has been convicted no longer tends to criminate, in the sense of the privilege," VIII *Wigmore on Evidence* §2279 (3d ed. 1940), a defendant who has not exhausted all post-conviction remedies still faces a risk of self-incrimination. If a defendant obtains a new trial, incriminating statements made during the appeal or post-conviction process, including those made during a clemency interview, might be admitted as evidence in that trial. Furthermore, an open-ended clemency interview could elicit incriminating statements regarding other acts unrelated to the prior conviction and could support new prosecutions for additional crimes. A coerced waiver of the privilege is particularly troubling here, where the state has arrange for the clemency review process to take place before or during Woodard's post-conviction proceedings in state court.[5]

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[5]Though this case especially raises concerns because of the ongoing post-conviction proceedings, we note that we do not rest our holding on that fact—a prisoner who had exhausted his post-conviction remedies might still risk self-incrimination with regard to other acts, and therefore might be subjected to the same unconstitutional condition.

Because this case is before the court on the pleadings, the facts have not yet been fully developed. We remand to the district court to determine more fully the nature of the APA's clemency procedures. If it is indeed the case that Woodard must risk self-incrimination to participate in the "optional" clemency interview, the district court should apply the unconstitutional conditions doctrine.

If the court on remand does find that the clemency process imposes an unconstitutional condition, one possible resolution of the Hobson's choice is illustrated in *United States v. Bounos*, 693 F.2d 38 (7th Cir. 1982). Writing for the court, Judge Posner held that individuals who were compelled to testify by a Hobson's choice—between asserting their double jeopardy claims and retaining their Fifth Amendment rights—did not waive the privilege against self-incrimination. *Id.* at 40. In fact, the court held that the government's position that they would waive the privilege by testifying in the double jeopardy hearing was "untenable in light of *Simmons*. . . . " *Id.* Although Seventh Circuit law did not recognize judicially created use immunity, "[t]he Fifth Amendment of its own force without the superaddition of a judicial immunity order" would prevent the government from using the individuals' statements against them in a subsequent prosecution. *Id.* Of course, such a holding in the case at hand would be premature at this point; the district court must first find the facts and determine whether an unconstitutional condition exists.

IV. EQUAL PROTECTION AND REMAINING CLAIMS

Woodard raised an equal protection claim in his complaint,

and he raises it here on appeal. Unfortunately, he failed to object when the magistrate judge did not address it in the report and recommendation to the district court. This failure is made more glaring by the fact that Woodard *did* object to the magistrate judge's omission of the Ninth Amendment claim. As a consequence, it seems that Woodard has waived the claim on this appeal. *See United States v. Walters*, 638 F.2d 947, 949-50 (6th Cir. 1981). Even if we were to address the claim on the merits, it is doubtful that we would find grounds for ruling in Woodard's favor. First, capital inmates are not a suspect class, contrary to Woodard's suggestion. Second, the State of Ohio could have a rational basis for treating capital and non-capital prisoners differently in clemency proceedings.

Woodard's remaining substantive due process, Eighth, and Ninth Amendment claims are equally without merit. Woodard cannot show a fundamental right to clemency—as noted earlier, the Due Process Clause does not necessarily guarantee even a first appeal as of right. Similarly, as long as procedural due process is not offended, there can be no independent Eighth Amendment argument that the clemency procedures inflict "cruel and unusual punishment." Finally, there is no precedent for attaching clemency rights to the Ninth Amendment.

V. CONCLUSION

The issues presented in this case are undoubtedly complicated and novel, but they also are not fully formed. As a consequence, because we conclude that Woodard has raised a Fifth Amendment argument warranting further scrutiny, we find it necessary to remand this case to the district court. On remand the district court should move beyond the pleadings stage and determine based on evidentiary materials whether Woodard must risk self-

incrimination to participate in the clemency interview under the APA's procedures; if so, the district court should apply the unconstitutional conditions doctrine as discussed in Part III. In addition, we disagree with the district court's determination that procedural due process is irrelevant to an evaluation of the state's death-penalty clemency procedures. On remand, the district court should reconsider Woodard's due process arguments in light of *Evitts v. Lucey* and related case law and in light of relevant evidentiary materials submitted by the parties. Finally, on all remaining arguments by Woodard, we affirm the district court.

AFFIRMED, in part, **VACATED** in part, and **REMANDED.**

MERRITT, Circuit Judge, concurring. I concur fully in the result and in the reasoning of Judge Moore's opinion for the Court in Sections I, II and IV. I concur in the result reached but not all of the language and reasoning of part III of Judge Moore's opinion. I concur in the result reached in part III because I agree that the case should be remanded to the District Court for findings and conclusions on the Fifth Amendment argument raised by Woodard.

DAVID A. NELSON, Circuit Judge, concurring in part and dissenting in part. Insofar as this court's judgment affirms that of the district court, I concur. Insofar as the judgment of the district court is vacated and the case remanded for further proceedings, I respectfully dissent.

I

On the evening of June 20, 1990, a 19-year-old college student named Mani Akram was driving an Oldsmobile car down Harvard Avenue near East 175th Street in the city of Cleveland. The vehicle was equipped with custom wheels

and a special stereo system.

Four young men who had decided to go "gaffling"[1] in a car stolen earlier in the evening spotted Mr. Akram's vehicle and intentionally collided with it. Two of the gafflers got out of the stolen car, and one of them -- identified by an eye witness as appellant Eugene Woodard -- went up to the Oldsmobile and shot Mr. Akram in the chest with a handgun.

Mr. Akram, who subsequently died from the wound, was dumped on the ground and left there for dead. His car was driven away, stripped, and torched. The gafflers argued over the division of the spoils, and a witness testified at trial that he heard Mr. Woodard say "I should get the radio. I'm the one that shot the guy." Other witnesses testified that they heard Mr. Woodard make similar statements, including, "I'm the one with the murder case," and "if the nigger die, it's me that shot him, so I should get the most." See *Woodard*, 68 Ohio St. 3d at 71, 623 N.E.2d at 76-77.

An Ohio jury found Mr. Woodard guilty of a number of crimes, including aggravated murder in the commission of a felony. The jury recommended imposition of the death penalty, and this recommendation was accepted by the trial court. Affirmances by a state court of appeals (see *State v. Woodard*, 1992 WL 84888 (Ohio App. 8th Dist. Apr. 23, 1992)) and the Supreme Court of Ohio followed. Mr. Woodard is now pursuing collateral remedies in the Ohio courts, as I understand it. His lawyers have said that if these efforts are unsuccessful, Woodard will seek habeas corpus relief in the federal courts.

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[1]The term has been defined as "forcibly removing people from their cars to rob them." *State v. Woodard*, 68 Ohio St. 3d 70, 71, 623 N.E.2d 75, 76 (1993), *cert denied*, 114 S.Ct. 2770 (1994).

Should these attempts to obtain collateral relief meet the same fate that the direct appeals did, Mr. Woodard plans to throw himself on the mercy of Ohio's governor. Article III, §11 of the Ohio Constitution, as amended effective January 1, 1996, empowers the governor "to grand reprieves, commutations, and pardons, for all crimes and offenses, except treason and cases of impeachment, upon such conditions as the Governor may think proper. . . ." As noted in the report and recommendation issued by the magistrate judge in the present civil rights action, "the Governor enjoys almost unfettered discretion in determining whether to grant or deny clemency." (Citation omitted.)

The manner of applying for pardons has long been subject to regulation by the Ohio General Assembly, and the constitutional amendment that became effective at the beginning of 1996 subjected the manner of applying for commutations to such regulation as well. It is crystal clear, however, that the legislature may not prescribe substantive regulations limiting the Governor's discretion to grant or withhold either type of clemency. "For example, the General Assembly could not . . . enact a statute requiring the Governor to accept the recommendation of the [Ohio Adult Parole Authority] in the exercise of his clemency power." *State ex rel. Maurer v. Sheward*, 71 Ohio St. 3d 513, 520, 644 N.E.2d 369, 375 (1994).

Under Ohio Rev. Code §2967.07, all applications for executive clemency must be made in writing to the Ohio Adult Parole Authority. Mr. Woodard has not yet submitted such an application. The parole authority (or "parole board," as it sometimes calls itself) nonetheless scheduled a "clemency review" for Mr. Woodard to be held on September 16, 1994. In connection with the review Mr. Woodard was notified that he could have a pre-hearing interview with representatives of the parole board if he

wished. This notification prompted the filing of the present civil rights suit, in which Mr. Woodard seeks a declaration that Ohio's death penalty clemency procedure is unconstitutional.

There appears to have been nothing sinister in the parole board's decision to initiate a clemency review before the filing of an application therefor. Under an Ohio Department of Rehabilitation and Correction regulation that became effective on July 21, 1994 -- the "Death Penalty Clemency Procedure" challenged here by Mr. Woodard -- the parole board must schedule a clemency review 45 days in advance of any scheduled execution date, unless that date has been stayed. The Ohio Supreme Court did not stay Mr. Woodard's execution until after the 45-day clock had started running, so the parole board seems to have had no choice in the matter. On the day after the filing of the complaint in the present lawsuit, however, the parties agreed to postpone the clemency review and not to reschedule it during the pendency of the suit without 30 days' notice. The district court subsequently entered a consent order to that effect.

If and when the parole board has occasion to reschedule the clemency review, the challenged regulation will give Mr. Woodard the option of requesting a personal interview. Part IV C.2. of the regulation provides as follows:

> "If the prisoner requests the personal interview, the parole board chair will appoint one or more board members or hearing officers to interview the prisoner at the confining institution. Only the prisoner and the person or persons assigned by the parole board chair shall be present at the interview."

The regulation goes on to provide that any statement given

by the prisoner at the interview shall be considered at the clemency hearing, along with all other relevant information that is available. (Such information can, of course, include affidavits, briefs, or other materials submitted by the prisoner's counsel.)

It was the submission of the parole board, in its motion for judgment, that an executive clemency review is not an integral part of any prior judicial proceedings; that there is no constitutional right to counsel at a clemency interview conducted pursuant to the prisoner's request; and that Ohio's executive clemency procedure does not compel the prisoner to be a witness against himself in violation of the Fifth Amendment. Magistrate Judge Kemp and District Judge Kinneary agreed with these submissions. I agree with them too.

II

The Declaration of Independence declares it to be self-evident that all men are endowed by their Creator with unalienable rights to life and to liberty. These God-given rights are not absolute -- if a Eugene Woodard takes the life of a Mani Akram in the commission of a felony, for example, the murderer obviously runs a risk that the state may take his life in return -- but our Constitution prohibits a state from depriving any person of life or liberty without due process of law.

My colleagues on the panel discern two strands in the due process jurisprudence relevant to the case before us. The first strand involves life or liberty interests that would not exist at all if not created by state or federal law in connection with the establishment of a procedure such as the one at issue here. The second strand involves "life" and "liberty" in the ordinary sense of those terms -- *i.e.*, life and liberty interests

that are independent of any state procedure.

As to the first strand, Judge Moore's lead opinion concludes (relying in part upon *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458 (1981)) that Mr. Woodard has no constitutionally protected life or liberty interest in Ohio's clemency procedure itself. This conclusion is clearly correct, in my view.

As to the second strand, the lead opinion suggests (with Judge Merritt fully concurring) that the Sate of Ohio has made its clemency procedure "an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant." See *Griffin v. Illinois*, 351 U.S. 12, 18 (1956), as quoted in *Evitts v. Lucey*, 469 U.S. 387, 393 (1985). The court concludes from this that Ohio's clemency procedure must be subjected to the same type of due process scrutiny applicable to every other stage of the adjudicatory process. I have difficulty reconciling this conclusion with what the Supreme Court did in *Dumschat*.

The plaintiff in *Dumschat* was a convicted murderer serving a life sentence in the Connecticut prison system. He had repeatedly applied to the Connecticut Board of Pardons for commutation of his sentence, and the Board had rejected each application without explanation. Mr. Dumschat brought a civil rights suit requesting the federal courts to declare that the board had violated his due process rights in denying his applications without giving any reasons for doing so. The Supreme Court refused to entertain this request, finding no constitutional liberty interest that could trigger due process protection.

It is true that the Court's opinion in *Dumschat* -- an opinion delivered by Chief Justice Burger -- dealt largely with the question whether Connecticut itself had created a federally

protected liberty interest. My colleagues' taxonomy places this sort of question in the first strand of due process jurisprudence, not the second strand. But it cannot be supposed that the *Dumschat* Court simply overlooked the second strand. Every member of the Court obviously knew that, as Justice Stevens explicitly said in dissent, the liberty protected by the Constitution "is not merely 'a statutory creation of the State.'" *Dumschat*, 452 U.S. at 469 (Stevens, J., dissenting), quoting *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974). Both strands of due process jurisprudence were unquestionably implicated by the facts presented in *Dumschat*.

Justice Stevens would have dealt with the second strand in much the same way that my colleagues have done here. As Justice Stevens saw it, the decision to grant or withhold commutation of the prisoner's sentence in *Dumschat* constituted "a regular and critical component of the decisionmaking process employed by the State of Connecticut to determine the magnitude of its deprivation of the prisoner's liberty." *Id.* at 471 (footnote omitted). "In my opinion," Justice Stevens continued, "the Due Process Clause applies to each step [including the step at which clemency is granted or withheld' and denies the State the power to act arbitrarily." *Id.* (footnote omitted).

I can readily appreciate the logic of Justice Stevens' dissent, just as I can appreciate the logic of my colleagues' apparent wish that the dissent had been the majority opinion. But there are many cases where, as the old saying has it, "a page of history is worth a volume of logic" -- and it is history and tradition, I take it, on which the majority of the Supreme Court relied in declining to follow the course urged by Justice Stevens in *Dumschat*. "[P]ardon and commutation decisions," as Chief Justice Burger said for the majority, "have not traditionally been the business of courts; as such,

they are rarely, if ever, appropriate subjects for judicial review." *Dumschat*, 452 U.S. at 464, citing *Meachum v. Fano*, 427 U.S. 215, 225 (1976) (footnote omitted).

Evitts v. Lucey, decided four years after *Dumschat*, did not purport to overrule that case -- and *Evitts* did not involve anything remotely resembling a pardon or commutation decision. The question presented in *Evitts*, rather, was whether the Due Process Clause guarantees a criminal defendant the effective assistance of counsel on his first appeal as of right. The Court answered this question in the affirmative, notwithstanding the absence of a constitutional requirement for any right of appeal at all. If a state elects to create an appellate procedure as an integral part of its adjudicatory process, the *Evitts* Court reasoned, the procedure must meet the demands of the Due Process Clause.

It may be true, as my colleague s suggest, that the same reasoning logically applies to any and all proceedings made available by the government beyond the first appeal as of right. But the Supreme Court has sometimes been dubious about the wisdom of pushing the logic of its decisions to the extreme. To do so can produce unintended consequences in the real world, for one thing,[2] to say nothing of creating

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[2]In *Sandin v. Conner*, 115 S.Ct. 2293 (1995), for example, the Court pointed out that *Hewitt v. Helmsi, 459 U.S. 460 (1983), had pushed the logic of Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1 (1979), to a point that had "create[d] disincentives for States to codify prison management procedures in the interest of uniform treatment." *Sandin*, 115 S.Ct. at 2299. Our disposition of the case at bar, similarly, could create disincentives for the State of Ohio to offer clemency petitioners an opportunity to have a personal interview with representatives of the parole board.

hopeless doctrinal conflicts. *Evitts* itself points out, citing *Ross v. Moffitt*, 417 U.S. 600 (1974), that the constitutional right to counsel is limited to the first appeal as of right and does not extend as far as habeas corpus proceedings. *Evitts*, 469 U.S. at 394. Yet habeas proceedings, I should have thought, form an integral part of the adjudicative system much more clearly than executive clemency proceedings do.

Acknowledging the "great distance" that lies between the trial and appeal stage, on the one hand, and the executive clemency stage on the other, my colleagues suggest that the due process protections mandated at the clemency stage "will necessarily be minimal, perhaps even barely perceptible. . . ." But once the camel's nose is under the tent, I suspect that it may prove difficult to keep the rest of the animal out. And if it really is true that clemency proceedings are to be constitutionalized only to a degree that is barely perceptible, perhaps this in itself casts doubt on the justification for constitutionalizing such proceedings in the first place. No other federal court has done so, as far as I am aware -- and generally speaking, at least, we have it on the highest authority that judicial review of clemency proceedings is simply not "appropriate." *Dumschat*, 452 U.S. at 464.

III

Part III of the lead opinion, as to which Judge Merritt has concurred in result but not in all of the language and reasoning, addresses Mr. Woodard's argument that Ohio's clemency procedure presents death row inmates with a "Hobson's choice" between participating in the procedure, on the one hand, and asserting a Fifth Amendment privilege against self-incrimination on the other hand. Noting that the argument "raises the specter of any unconstitutional condition," and suggesting that there may be no "compelling state interest in requiring waiver of Fifth Amendment rights

by clemency interviewees," the opinion concludes that, absent any such state interest, "Woodard has raised a colorable unconstitutional conditions claim" that necessitates a remand of the case.

With respect, I disagree. Mr. Woodard has not raised a colorable unconstitutional conditions claim, in my view; the concerns he raises strike me as far too spectral, at this point, to warrant intervention by a federal court.

The Fifth Amendment, as applied to the states by the Fourteenth Amendment, says that "[no person] shall be compelled in any criminal case to be a witness against himself. . . . " Mr. Woodard, who is represented by able counsel, is surely not unaware of this provision. And if Mr. Woodard should choose to exercise the option of speaking privately to representatives of the board that will issue a recommendation on relief from the death sentence, I am aware of no reason at all to suppose that he could be "compelled" to say anything that might be offered against him in a different criminal case or in a new trial for the murder of which he currently stands convicted.

Ohio's clemency procedures, as I read them, do not empower the parole board or its representatives to compel a prisoner who requests a personal interview to answer a single question -- or, having answered some questions, to answer others that may be asked. On its face, the challenged regulation simply does not require a waiver of the Fifth Amendment right against self-incrimination; as far as the regulation discloses, a prisoner who requests a clemency interview remains free to say as much or as little at the

interview as he wishes.[3]

It is conceivable, of course, that a prisoner who requests a personal interview could volunteer something that might tend to incriminate him. It is conceivable that evidence of what the prisoner volunteered could later be offered against him in an Ohio court. And it is conceivable that the Ohio court could rule such evidence admissible, just as it is conceivable that such a ruling could be upheld on appeal. But I think it would be "premature," to borrow the adjective used by the United States Supreme Court in *Baxter v. Palmigiano*, 425 U.S. 308, 324 (1976), for a federal court to instruct Ohio on how to deal with situations that may never materialize at all and the facts of which can only be imagined at this point.

What is it, precisely — besides writing a longer opinion — that the district court is supposed to do with this case on remand? We are told that district court should "analyze Woodard's specific arguments under *Evitts*" and the principles outlined in Part II of this court's opinion, but Part II itself would seem to have accomplished much of this task already. Perhaps the district court is to hold an evidentiary

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[3]Acknowledging that "we cannot be certain that the defendants would actually impose" a waiver requirement, the lead opinion suggests that for present purposes we must accept the allegations of the plaintiff's complaint as true. But the complaint merely pleads, in conclusory form, that "Mr. Woodard will be irreparably harmed in that he will be permanently deprived of his Fifth . . . and Fourteenth Amendment rights against self-incrimination. . . ." The pleading of a legal conclusion such as this does not foreclose us from making our own assessment of the law in light of all well pleaded facts. The regulation containing the Ohio Death Penalty Clemency Procedure is properly before us, I believe, but speculation as to matters not addressed in the regulation can hardly qualify as a well-pleaded fact.

hearing to determine what percentage of prisoners granted clemency have taken advantage of the interview option. *Dumschat*, however, seems to suggest that this datum would be irrelevant. See 452 U.S. at 465. In any event, we are told that the district court should "determine more fully the nature of the APA's clemency procedures," consider whether the clemency interview procedure "might" impose an unconstitutional condition, and decide whether Mr. Woodard will "risk" self-incrimination if he participates in an interview. The assessment of such a risk *ex ante* will be a highly theoretical undertaking, it seems fair to say, and I seriously question its utility.

Mr. Woodard tells us in his complaint that he "does *not* contemplate that this action will have any effect on his state convictions and/or sentences (including his death sentence). . . ." (Emphasis in original.) If there is theoretical risk of self-incrimination here, it is a risk relating to criminal proceedings that have not yet been initiated and may never be initiated. In this respect, it seems to me, the case at bar is precisely analogous to *Baxter v. Palmigiano*. And just as the relief granted by the lower courts in *Baxter* was held to be "premature" (at least insofar as it was not flatly inconsistent with *Wolff v. McDonnell*), I think it is premature for us to require the district court to consider granting relief against a risk of self-incrimination that is purely academic at this point.

I would affirm the judgment of the district court across the board.

DATE: September 8, 1995

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

EUGENE WOODARD,

Plaintiff,

v. Case No. C-2-94-892

OHIO ADULT PAROLE AUTHORITY, et al.,

Defendants.

OPINION AND ORDER

This matter is before the Court on objections made by Plaintiff Eugene Woodard to the Report and Recommendation of the Magistrate Judge concluding that the Defendants' motion for judgment on the pleadings should be granted. Because of Plaintiff's objections, this Court reviews the record *de novo*.

Plaintiff's first objection is that the Death Penalty Clemency Procedure of the State of Ohio did not adequately protect his interests under the Due Process Clause of the Fourteenth Amendment. Second, Plaintiff objects to the Magistrate Judge's conclusions that the Fifth, Sixth, Eighth and Ninth Amendments were not violated by the procedure.

This Court reaches the same conclusion as the Magistrate Judge, namely that Plaintiff did not merit due process protection because he did not have a protectable

interest at stake in the Clemency Procedure. In *Sweeton v. Brown*, 27 F.3d 1162, 1165-66 (1994), the Sixth Circuit *en banc* addressed a similar issue and held that inmates have no protected liberty interest in parole procedures where the decisions made under those procedures were wholly discretionary. *See also Olim v. Wakinekona*, 461 U.S. 238, 249 (1983) (no due process interest for prisoners transferred between states where transfers were discretionary). This reasoning is persuasive here. As the Magistrate Judge found, the statutes and procedures used by the State of Ohio to review death penalty cases do not create a right to clemency; instead, the Governor, as the ultimate decisionmaker, retains almost complete discretion over whether to grant clemency. Therefore, there prisoners have no entitlement to clemency, and no procedural due process interest in clemency. The Court also agrees with the Magistrate Judge that the right to a clemency hearing is not implicit in the concept of ordered liberty and therefore does not give rise to substantive due process protection.

The Court finds the Magistrate Judge's resolution of Plaintiff's other objections dealing with his constitutional rights to be proper under these facts.

Upon consideration and being duly advised, and for the reasons enumerated above, the Court ADOPTS the Report and Recommendation of the Magistrate Judge and incorporates its conclusions of fact and law by reference. The Court GRANTS Defendants' motion for judgment on the pleadings and DENIES Defendants' motion for a stay or discovery as moot. This case is terminated.

IT IS SO ORDERED.

/s/ Joseph P. Kinneary
UNITED STATES DISTRICT JUDGE

DATE: July 20, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Eugene Woodard,	:	
Plaintiff,	:	
v.	:	Case No. C2-94-892
Ohio Adult Parole Authority, et al.,	:	JUDGE KINNEARY
Defendants.	:	

REPORT AND RECOMMENDATION

Eugene Woodard, a state prisoner under sentence of death, filed this 42 U.S.C. §1983 action on September 14, 1994. He named as defendants the Ohio Adult Parole Authority ("OAPA"), the Parole Board, and each member of the OAPA or Board in his or her official and individual capacities. The gist of this case is Woodard's claim that his constitutional rights have been or may be violated by the clemency procedures employed by the State of Ohio.

Defendants filed a motion for judgment on the pleadings on January 9, 1995 and moved to stay discovery. Woodard has opposed both motions. The dispositive motion was referred to the undersigned for the issuance of a Report and Recommendation. For the following reasons, it is recommended that the motion for judgment on the pleadings

be granted and the motion to stay discovery be denied as moot.

I.

A motion for a judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c) is governed by the same standard as a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6). *Abbott Laboratories v. NutraMax Products*, 844 F. Supp. 443 (N.D. Ill. 1994). Therefore, a court must accept all factual allegations in the complaint as true and should grant the motion only when the movant is entitled to judgment as a matter of law. *Stychno v. Ohio Edison Co.*, 806 F. Supp. 663 (N.D. Ohio 1992). All reasonable inferences must be drawn in favor of the nonmoving party. *Id.* A court may not dismiss the action unless it is convinced that the plaintiff can prove no set of facts in support of the claim which would entitle him or her to relief. "*Bloor v. Carro, Spanbock, Londin, Rodman, & Fass*, 754 F.2d 57 (2d Cir. 1985)." It is against this standard that the instant motion must be evaluated.

II.

Woodard has exhausted all of the direct appeals of his criminal conviction, including an appeal to the United States Supreme Court, which denied certiorari. The Ohio Supreme Court issued a stay of execution on August 24, 1994 so that Woodard could pursue post-conviction relief.

The facts surrounding Woodard's cause of action, as set forth in his complaint, follow. On September 6, 1994, Woodard's counsel learned that a clemency hearing was scheduled for September 16, 1994 and that the OAPA would interview Woodard on September 9, 1994 at the Southern Ohio Correctional Facility ("SOCF"). This hearing and

interview were to be conducted according to the new Death Penalty Clemency Procedure ("Clemency Procedure"), as adopted by the OAPA. Because neither Woodard nor his counsel had filed a petition for clemency and because Woodard believed the Clemency Procedure was constitutionally infirm, his counsel sent a letter to the OAPA objecting to the clemency hearing and interview, requesting the right to be present for all interviews and hearings, and requesting a continuance of the proceedings on the basis that a stay of execution was in effect. Because counsel had only recently been appointed, he also argued that he could not effectively represent Woodard's interests in the clemency hearing. Finally, counsel for Woodard argued more information and investigation were necessary for a proper and thorough clemency review. The OAPA failed to respond to these requests. The OAPA did not meet or talk with Woodard or his counsel on September 9, 1994, although all parties were present at the SOCF at the same time.

Woodard alleges that if the OAPA conducts its clemency hearing in accordance with the Clemency Procedure, he will be precluded from requesting additional clemency proceedings without leave of OAPA. In addition, because Woodard is currently engaged in ongoing litigation regarding his conviction and sentence, he argues that the defendants, who are agents, representatives, and agencies of the State of Ohio, cannot require Woodard to discuss his case without the presence of counsel. Woodard asserts that he will be permanently deprived of his Fifth, Sixth, Eighth, Ninth, and Fourteenth Amendment rights to be free from self-incrimination, to have effective assistance of counsel, to be free from cruel and unusual punishment, to have the equal protection of the law, and to have substantive and procedural due process.

Woodard requested a declaration that the policy of the

OAPA is unconstitutional; a preliminary injunction providing that the defendants may not interview Woodard without the consent and presence of counsel; a preliminary injunction providing that the defendants may not conduct a clemency hearing in regard to Woodard until such time as the plaintiff petitions for such a hearing or, in the alternative, until such time as there is a thorough investigation; an order enjoining the defendants from applying the clemency procedure to Woodard; an order that plaintiff be awarded costs and attorneys' fees; and an order awarding to the plaintiff other such relief as the Court may deem just and proper.

On September 16, 1994, District Court Judge Joseph P. Kinneary signed a consent decree which indefinitely postponed the clemency hearing scheduled for Woodard on September 16, 1994. Pursuant to the order, no clemency hearings or clemency interviews regarding Woodard are to be held without 30 days notice to the Court, counsel for Woodard, and Woodard.

III.

A. *Statutory and Regulatory Framework*

The Ohio Constitution reposes the power of clemency in the Governor. Article III, Section 11 of the Ohio Constitution provides that "he shall have power, after conviction, to grant reprieves, commutations, and pardons, for all crimes and defenses, except treason and cases of impeachment, upon such conditions as he may think proper. . . ."

O.R.C. §2967.03 grants to the OAPA the power to "exercise its functions and duties in relation to the pardon, commutation, or reprieve of a convict upon direction of the governor or upon its own initiative. . . ." Further, the "authority may recommend to the governor the pardon,

commutation, or reprieve of sentence of any convict or prisoner, . . . , if in its judgment there is reasonable ground to believe that, if the convict is granted a pardon, commutation, or reprieve, . . . such action would further the interests of justice and be consistent with the welfare and security of society." O.R.C. §2967.03. Applications for executive pardon, commutation, or reprieve are addressed in O.R.C. §2967.07:

> All applications for pardon, commutation of sentence, or reprieve shall be made in writing to the adult parole authority. Upon the filing of such application, or when directed by the governor in any case, a thorough investigation into the propriety of granting a pardon, commutation, or reprieve shall be made by the authority, which shall report in writing to the governor a brief statement of the facts in the case, together with a recommendation of the authority for or against the granting of a pardon, commutation, or reprieve, the grounds therefore and the records or minutes relating to the case.

O.A.C. §5120:1-1-15 governs the handling of applications for pardon, reprieve, or commutation by the OAPA. All applications for clemency must be made in writing to the Chief of the OAPA. When an application is filed with the OAPA, it is required to conduct "such investigation as is necessary" and to make a recommendation to the Governor. Hearings are held at the discretion of the Parole Board. In the event that the Parole Board recommends for or against clemency, such recommendation is forwarded to the Governor, together with a brief statement of the facts, the ground for such recommendation, and the record or minutes of the case. The decision of the Parole

Board to recommend for or against clemency is within its sole discretion and is not subject to administrative review. If the OAPA receives an application for clemency for a person for whom clemency was denied less than two years earlier and the OAPA does not believe that the application contains any grounds that were not or could not have presented in the earlier application, "the parole authority may forward the application to the governor with the recommendation that it be denied on the basis of the earlier review and denial." In such a case, the OAPA need conduct no further hearing or investigation unless specifically requested by the Governor. Finally, O.A.C. §5120:1-1-15 provides that the OAPA shall consider a case for pardon or commutation only upon the application of the convicted person or his counsel or at the direction of the Governor.

The Clemency Procedure at issue became effective on July 21, 1994. The stated purpose of the Clemency Procedure is "to establish a standard procedure for handling applications for clemency in death penalty cases and for review of death penalty cases where no application has been filed." According to the clemency procedure, a copy of the procedure must be given to all death row inmates. When an inmate's direct appeals are exhausted and an execution date has been fixed, a copy of such decision is forwarded to the Parole Board. Upon receipt of the notice that direct appeals are exhausted and an execution date has been fixed, or upon its own initiative, the Parole Board requests an investigation into the details of the prisoner's offense, prior record, and other relevant information. Forty-five days before the execution date, the Parole Board schedules a clemency review, unless the execution date is stayed. This review should be conducted approximately 21 days before the execution date. Notice of the clemency review is sent to the sentencing court, the prosecutor, and the victim's family or representative. A notice is also sent to the prisoner advising

that he or she may be interviewed and make statements which will be considered by the Parole Board. A copy of this notice must be sent to the Public Defender or other counsel for the prisoner. Finally, once the clemency review hearing has been completed, a recommendation to the Governor is made.

If the prisoner requested a personal interview, the Parole Board Chairperson appoints one or more members of the Board or Hearing Officers to interview the prisoner. Only the prisoner and the person or persons assigned to conduct the interview are allowed to be present. Only the Parole Board and individuals that attended the interview may attend the Clemency hearing. Attendance of others is at the discretion of the Parole Board Chairperson. At the hearing, the Parole Board considers all relevant information and its decision is communicated to the Chief Legal Counsel for the Governor. The Parole Board also notifies the prisoner and his or her counsel, the prosecutor, the victim's family or representative, and the Attorney General of its recommendation. Finally, the Parole Board prepares a press release. If new information comes to light which was not considered in its initial recommendation, or if the Parole Board receives a subsequent petition on behalf of the prisoner, the Parole Board may supplement its initial decision and recommendation.

B. *Due Process Claim*

Before procedural due process protections are triggered, an underlying liberty or property right must exist that is created by the Federal Constitution or by state law. *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458, 463 (1981). However, there is no "constitutional or inherent right" to clemency. *Dumschat, supra*, at 464. Thus, the basis for any constitutional claim in the instant case must be

"found in statutes or other rules defining the obligations of the authority charged with exercising clemency." *Id.* at 465. "[A] state creates a protected . . . interest by placing substantive limitations on official discretion. An inmate must show 'that particularized standards or criteria guide the state's decisionmakers.'" *Olim v. Wakinekona*, 461 U.S. 238, 249 (1983) (quoting *Dumschat, supra*, at 467 (Brennan, J., concurring)). If "the decisionmaker can deny the requested relief for any constitutionally permissible reason or for no reason at all," the state has not created a constitutionally protected interest. *Dumschat, supra*, at 467 (Brennan, J., concurring).

In Ohio, the Governor enjoys almost unfettered discretion in determining whether to grant or to deny clemency. *State ex rel. Maurer v. Sheward*, 71 Ohio St. 3d 513, 644 N.E.2d 369, 373-74 (1994), *reconsideration denied sub nom., Wilkinson v. Maurer*, 71 Ohio St. 3d 1462, 644 N.E.2d 1385 (1995). The only restrictions on a Governor's clemency power are those authorized by the Ohio Constitution. *Id.*, 644 N.E. 2d at 373. Those constitutional restrictions provide that clemency may be granted only after conviction, may be granted only partially in cases of treason, and may not be granted at all in cases of impeachment. *Id.*; Ohio Constitution, Art. III, §11. In addition, the legislature cannot prescribe substantive regulations on the Governor's discretion in the use of clemency power or in any way intrude on the Governor's discretion. *Id.* at 374-75. Therefore, only regulations created by the Executive Branch of the Ohio government which intrude on the discretion of the Governor to use the clemency power could give rise to a state-created right which is protected by the Due Process Clause of the United States Constitution.

The Clemency Procedure at issue in the instant case is analogous to the challenged prison regulations in *Olim*,

supra. In *Olim*, the Court held that limitations on the procedures to be followed by a purely advisory committee did not invoke due process protections where the ultimate decisionmaker's discretion remained free. 461 U.S. at 249-50. Here, the challenged Clemency Procedure does not attempt to limit the Governor's discretion. The Clemency Procedure merely prescribes a method by which the OAPA, an advisory committee with respect to clemency, prepares itself to report to the Governor in cases where no application for clemency has been filed. The only mandatory language contained in the Clemency Procedure applies to the OAPA, an authority empowered to make only non-binding recommendations regarding clemency.

The Clemency Procedure does not dictate to the Governor what he or she must do with the recommendation and nothing prevents the Governor from investigating, holding a hearing, or proceeding in any manner as the Governor chooses. The challenged procedure imposes no limit on what procedure is to be followed, what evidence may be considered, or what criteria are to be applied by the Governor, the official who holds the clemency power and the discretion in its use. Therefore, the Governor's ability to wield the clemency power is not infringed by the Clemency Procedure because that official is not hampered by "particularized standards or criteria." Thus, no right to clemency has been created by the state and procedural due process protections are not triggered. In Ohio, clemency is a power held by the Governor; it is not a right held by a person who has been lawfully convicted.

Woodard fails to raise a substantive due process claim because there is no right to clemency which is so vital that "neither liberty nor justice would exist if [it] were sacrificed." *Bowers v. Hardwick*, 478 U.S. 186, 191-94 (1986) (citations omitted.).

C. *Other Constitutional Claims*

Woodard also argues that his Fifth, Sixth, Eighth, and Ninth Amendments rights, made applicable to the states through the Fourteenth Amendment, have been or will be violated if the Clemency Procedure is followed. The undersigned recommends the Court find, to the extent these claims were raised, that they lack merit. The Fifth Amendment right against self-incrimination is not implicated when the decision to communicate is completely voluntary and the state does not seek to deprive a person of another protected right for refusal to communicate. *See Simmons v. United States*, 390 U.S. 377, 389-94 (1968). Further, the Sixth Amendment right to counsel extends only through the first appeal as of right. *See Evitts v. Lucey*, 469 U.S. 387 (1985); *Pennsylvania v. Finley*, 481 U.S. 551 (1990); *Coleman v. Thompson*, 111 S.Ct. 2546 (1991). Clemency procedures are unrelated to the first appeal as of right or to other, earlier, critical stages of the criminal prosecution. Finally, because clemency or its denial is not an imposition of punishment, the Eighth Amendment right to be free from cruel and unusual punishment is not at issue. *See Herrera v. Collins*, 113 S.Ct. 853, 867 (1993).

D. *Motion to Stay Discovery*

Defendants move to stay discovery when they filed their dispositive motion. They did provide plaintiff with all past versions of the clemency procedures, however, and advised plaintiff that there were no other relevant written policies that were responsive to plaintiff's discovery requests. They declined, however, to identify each person who is or was involved in reviewing clemency applications or to provide copies of reports or recommendations relating to other death sentenced individuals. The Court does not believe that any of the documents requested but not produced

would have any bearing on the threshold question of whether the due process clause applies to the clemency procedure in Ohio. Therefore, it will be recommended that if this Report and Recommendation is adopted, the motion relating to discovery be dismissed as moot.

IV.

For the foregoing reasons, the undersigned recommends that the defendant's motion for judgment on the pleadings be granted because the plaintiff can prove no set of facts which would entitle him to relief and the defendants are entitled to judgment as a matter of law. Further, it is recommended that if the Report and Recommendation is adopted, the defendants' motion to stay discovery be dismissed as moot.

V. *PROCEDURE ON OBJECTIONS*

If any party objects to this Report and Recommendation, that party may, within ten (10) days of the date of this Report, file and serve on all parties written objections to those specific proposed findings or recommendations to which objection is made, together with supporting authority for the objection(s). A judge of this Court shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made. Upon proper objections, a judge of this Court may accept, reject, or modify, in whole or in part, the findings or recommendations made herein, may receive further evidence or may recommit this matter to the magistrate judge with instructions. 28 U.S.C. Section 636(b)(1).

The parties are specifically advised that failure to object to the Report and Recommendation will result in a

waiver of the right to have the district judge review the Report and Recommendation *de novo*, and also operates as a waiver of the right to appeal the decision of the District Court adopting the Report and Recommendation. *See Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).

/s/ Terence P. Kemp
United States Magistrate Judge